84-1518

No.

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., AND
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,

and

THE DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM S. BUSKER
KENNETH E. SIEGEL
2200 Mill Road—Room 823
Alexandria, VA 22314
(703) 838-1857
Attorneys for Tri-State Motor Transit Co., and American Trucking Associations, Inc.

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOSEPH E. KOLICK, JR.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for International Brotherhood of Teamsters, Etc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5 6 PP

QUESTION PRESENTED

For over forty years railroads (and railroad affiliates) have been granted motor carrier operating authority other than that which is auxiliary to and supplemental of rail service only if the applicant can establish "special circumstances" negativing any disadvantage to the public from the fact that it is a railroad. The Motor Carrier Act of 1980 and the Staggers Rail Act of 1980 amended the Interstate Commerce Act to a substantial extent, but retained the statutory provisions on which the "special circumstances" doctrine was held to rest. The question presented is:

Is the Interstate Commerce Commission empowered to abandon the "special circumstances" doctrine, thereby permitting unrestricted entry of railroads into motor carrier operations, although this Court has held, in a series of decisions culminating in *American Trucking Assns. v. U.S.*, 364 U.S. 1, that this doctrine is a Congressional mandate under the Interstate Commerce Act?

PARTIES IN THE COURT BELOW

Tri-State Motor Transit Company

American Trucking Associations, Inc.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

The Denver and Rio Grande Western Railroad Company

Interstate Commerce Commission

United States of America

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE COURT BELOW	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The History of and Statutory Basis for the "Special Circumstances" Doctrine	3
B. The Instant Litigation	8
1. Proceedings Before the Commission	8
2. Proceedings Before the Court of Appeals	9
REASONS FOR GRANTING THE WRIT	10
I. THE DECISION BELOW CONFLICTS WITH A SERIES OF DECISIONS OF THIS COURT AND WITH A LONGSTANDING, UNALTERED CONGRESSIONAL POLICY	10
II. THE QUESTION IS IMPORTANT TO THE ECONOMIC HEALTH OF THE MOTOR CARRIER INDUSTRY	17
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	9a
APPENDIX D	14a
APPENDIX E	19a
APPENDIX F	28a

TABLE OF AUTHORITIES

CASES: Page

American Trucking Assns. v. U.S., 355 U.S. 141 (1957) (ATA I) 6, 8, 13, 14, 16
American Trucking Assns. v. U.S., 364 U.S. 1 (1960) (ATA II) ..... *passim*
B-H Transfer Co. v. United States, 420 U.S. 968 (1975) 15
Ex parte MC-156, Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates, 132 M.C.C. 978 (1982), *affirmed*, 722 F.2d 1243 (C.A. 5), *cert. den.*, 53 U.S.L.W. 3324 (1984) ..... *passim*
Kansas City S. Transport Co., Inc., Com. Car. Application, 10 M.C.C. 221 (1938) 11, 12
Labor Board v. Insurance Agents, 361 U.S. 477 (1960) 16
Pennsylvania Truck Lines, Inc.-Control-Barker, 1 M.C.C. 101 (1936) 11
Rock Island M. Transit Co.-Purchase-White Line M. Frt., 40 M.C.C. 457 (1946) 5, 6
United States v. Rock Island Co., 340 U.S. 419 (1951) 6, 11, 12, 15, 16, 17

STATUTES AND RULES:

Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.*

49 U.S.C. § 10101(a)(1)(A) 7, 11, 15
§ 10101(a)(2)(I) 2
§ 10922(b)(1) 6
§ 10922(b)(2)(B) 6
§ 11344(c) ..... *passim*

Judicial Code:

28 U.S.C. § 1254(1) 2
§ 2321 2
§ 2342(5) 2

Motor Carrier Act of 1935, Pub. L. No. 255, Ch. 498, 49 Stat. 453 (1935):

§ 213(a)(1) 5

TABLE OF AUTHORITIES—Continued

	Page
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	*passim*
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980)	*passim*
United States Supreme Rule 17.1(c)	11
MISCELLANEOUS	
Fortune, June 11, 1984	28a
Motion to Affirm U.S. Sup. Ct. No. 74-515	15
Notice of Proposed Policy Statement, 46 F.R. 50423	7
Railroad Deregulation Act of 1979: Hearings on S. 796 Before the Senate Subcommittee on Surface Transportation of the Sen. Comm. on Commerce, Science and Transportation, 96th Cong., 1st Sess. 221 (Part I, 1979)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

TRI-STATE MOTOR TRANSIT CO., AND
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,

and

THE DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Interstate Commerce Commission Review Board is not reported and is reproduced in the appendix at pp. 9a-13a, *infra*. The final opinion of the Interstate Commerce Commission is not reported and is reproduced at pp. 14a-17a, *infra*. The opinion of the Court of Appeals denying a petition for review of that decision is reported at 739 F.2d 1373, and is reproduced at pp. 1a-7a, *infra*.

JURISDICTION

The decision of the Court of Appeals was issued on August 3, 1984 and a timely petition for rehearing and suggestion for rehearing en banc filed by the respondent agency was denied on October 26, 1984. (P. 8a, *infra*). On January 15, 1985 Justice Blackmun signed an order extending the time for filing this petition to March 25, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 2321 and 2342(5).

STATUTORY PROVISIONS INVOLVED

This case involves the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, as amended by the Motor Carrier Act of 1980, P.L. 96-296, 94 Stat. 793, and the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895. The pertinent provisions are reproduced at pp. 18a-27a, *infra*.

STATEMENT OF THE CASE

This petition grows out of the decision of the Interstate Commerce Commission ("ICC" or "Commission") to grant the Denver & Rio Grande Western Railroad ("DRGW") authority to conduct a nationwide general commodities trucking operation. That decision represented a particularized application of a policy shift announced in a rulemaking proceeding, *Ex Parte MC-156, Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982), *affirmed*, 722 F.2d 1243 (C.A. 5), *cert. den.*, 53 U.S.L.W. 3324 (1984), wherein the Commission abandoned the "special circumstances doctrine" which had limited rail affiliated motor carriers to operations "auxiliary to or supplemental of" the company's rail operations unless the company could demonstrate special circumstances justifying an exception to the general rule. The decision in *Ex Parte MC-156* will be referred to hereafter as "the Policy Statement." The court below

concluded that the Commission was empowered to abandon the special circumstances doctrine and grant unrestricted trucking authority to rail carriers on the same basis as any other applicant. The correctness of that holding is the issue presented by this case. In order to put that issue in context, we shall first describe the history and statutory basis for the doctrine, and we shall then set forth the proceedings in this litigation.

A. The History of and Statutory Basis for the "Special Circumstances" Doctrine

1. In its Policy Statement the ICC correctly characterized the doctrine at issue in this case as follows:

> The "special circumstances" doctrine requires the *restriction to incidental rail service of motor carrier operating authority issued to railroads or rail affiliates in licensing proceedings unless special circumstances are shown* that unrestricted authority is required to fulfill a compelling public need for service not being offered by independent motor carriers. The aim of the doctrine is to prevent rail domination of motor carrier markets. [132 M.C.C. 978, emphasis added]

The Policy Statement also described the origins and statutory underpinnings of the doctrine:

> The "special circumstances" doctrine has its origins in the earliest days of the Commission's regulation of motor carriers. The underlying policy against granting unrestricted motor carrier operating authority to railroads or their affiliates originated in the motor-rail acquisition and control section 213(a)(1) of the Interstate Commerce Act as amended by the Motor Carrier Act of 1935. This legislation prohibited a railroad from acquiring or merging with a motor carrier "unless * * * the transaction * * * [would] promote the public interest by enabling the [rail] carrier * * * to use service by motor vehicle to public advantage in its opera-

tions and not unduly restrain competition." Pursuant to this statutory language, the Commission restricted motor operations resulting from rail-motor acquisitions proceedings to those auxiliary or supplemental to rail service. See *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936). The rationale for this policy was to protect the nascent motor carrier industry from anti-competitive control by the more mature railroads with their dominant size and great financial resources. *Id.* at p. 112.

Although there was no express statutory requirement for doing so, this principle was extended to motor carrier licensing proceedings under sections 207 and 209 of the act. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240-41 (1938) (The Commission found that the motor carrier applicant's affiliation with a railroad required imposition of specific auxiliary-to-rail restrictions). The basis for this was both the Commission's interpretation of the acquisition section 213 (a) (1), and the requirements of the Declaration of Policy of the Motor Carrier Act of 1935, which provided that the Commission was—

> to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, * * * improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers * * *.

The "special circumstances" doctrine itself was a departure from the strict requirement of imposing auxiliary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail-affiliated ap-

> plicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. See *e.g., Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946). [132 M.C.C. 980-981, footnote omitted]

2. The *Rock Island* case was the ICC's first major decision on this subject after the pertinent language of § 213(a)(1) of the 1935 Motor Carrier Act was reenacted as § 5(2)(b) of the 1940 Interstate Commerce Act, 54 Stat. 906. The ICC there stated:

> The reenactment of Section 213 as part of Section 5 . . . without any change suggesting any dissatisfaction with our established administrative construction thereof must be taken as a definite approval thereof, which speaks strongly against any significant departure therefrom in the future. [40 M.C.C. 457, 468-469]

And in *Rock Island* the ICC succinctly explained the meaning of the doctrine:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden . . . by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negating any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. [40 M.C.C. at 474.]

The foregoing "special burden" formulation was quoted with approval by this Court in affirming the *Rock Island* decision (*United States v. Rock Island Co.*, 340 U.S. 419,

428-429, n.4), and again in *American Trucking Assns. v. U.S.*, 355 U.S. 141, 151 (*"ATA I"*).

In *ATA I* the Court affirmed the grant to a railroad subsidiary of authority to supply motor service which was not auxiliary to and supplemental of train service because special circumstances had been shown, but stressed

> that the underlying policy of 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole." [355 U.S. at 151-152]

And, in *American Trucking Assns. v. U.S.*, 364 U.S. 1 (*"ATA II"*), this Court held that the Commission had committed an error of law by issuing unrestricted motor carrier operating authority without finding that special circumstances justified such a grant. *Id.* at 6-15. The *ATA II* decision is fully discussed at pp. 11 to 14, *infra*.

3. In 1980 Congress enacted two statutes which amended the Interstate Commerce Act's regulation of motor carriers (the Motor Carrier Act of 1980) and of railroads (the Staggers Rail Act of 1980). In general, as the court below observed, these amendments adopted a "deregulatory approach" (p. 7a, *infra*). Specifically, the 1980 Motor Carrier Act eased restrictions on entry into the trucking industry by eliminating altogether certain of the substantive requirements for an operating license, by liberalizing the remaining requirements, and by shifting the burden of proof to those opposing an application for operating authority. See 49 U.S.C. §§ 10922(b)(1) and (b)(2)(B), (pp. 24a-25a, *infra*). The Motor Carrier Act amendments also evinced a new congressional emphasis on intermodal operations. The Act expressly declared that national transportation policy is to "promote intermodal transportation." 49 U.S.C. § 10101(a)

(2)(I) (pp. 19a-20a, *infra*). However, the amendments preserved the portion of the National Transportation Policy which directs that the Act be so administered "as to recognize and preserve the inherent advantage of each mode of transportation", 49 U.S.C. § 10101(a)(1)(A) (p. 19a, *infra*). Likewise unchanged was § 5(2)(b) of the 1940 Act (now 49 U.S.C. § 11344(c), p. 27a, *infra*) which, as we have seen, permits railroad acquisition of motor carriers only when the acquisition "* * * will enable the rail carrier to use motor carrier transportation to public advantage in its operations * * *."

In *Ex Parte MC-156*, the ICC issued a Policy Statement wherein it concluded "that the 'special circumstances' doctrine should be eliminated from motor carrier licensing proceedings." (132 M.C.C. at 987).[1] The ICC asserted that "[t]he 'special circumstances' doctrine is not a viable policy under the newly revised Interstate Commerce Act." (Heading, *id.*) It observed that at "the heart of [the 1980 Motor Carrier Act] is the mandate for eased regulatory entry requirements offering 'increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services'[; the] new licensing provisions at 49 U.S.C. 10922 and 10923 markedly reduce the burden of proof of those seeking motor carrier authority and substantially increase the burden of proof of those opposing the issuance of motor carrier authority." Also, the "Staggers Rail Act of 1980 endorses more competitive, less restricted rail operations and stresses minimized federal control over the rail transportation system."

---

[1] The Policy Statement issued in a proceeding which was initiated by the ICC by a Notice of Proposed Policy Statement (46 F.R. 50423) in which the ICC sought public comment on the "continued viability" of the "special circumstances" doctrine in light of the 1980 amendments. Comments were received from motor carrier and rail carrier interests, shippers, freight forwarders and the United States Department of Transportation. See 132 M.C.C. at 978.

(*Id.*) The ICC opined that *ATA I* and *ATA II* no longer have "precedential value" because (1) the "special circumstances" doctrine did not establish an absolute bar to the licensing of rail affiliates to perform non-rail-related motor service, and (2) after those decisions "circumstances and the transportation legislation have changed markedly." (*Id.* at 988.) The ICC asserted that "the special circumstances doctrine is an *agency* 'created and transformed' doctrine" and as such is not "immutable" but "must change with the changing realities of the economy and the industries regulated by the Commission." (*Id.*, emphasis added.)

B. The Instant Litigation

1. *Proceedings Before The Commission*

On April 8, 1983, DRGW applied to the ICC for trucking authority to haul general commodities nationwide. Pursuant to the Commission's modified approval procedures, ICC Review Board No. 1 tentatively granted DRGW's application. Tri-State contested that action on two grounds: first, the grant would harm Tri-State's overall operations contrary to the public interest; and second, the application was fatally defective because DRGW failed to demonstrate "special circumstances" justifying authority for unrestricted motor carrier operations, that is, motor service not incidental and auxiliary to DRGW's rail service.

In a decision served September 8, 1983, the ICC Review Board affirmed the tentative grant of unrestricted motor carrier authority. The license was approved on the view that "a railroad need no longer demonstrate 'special circumstances' in order to obtain unrestricted motor carrier authority," citing the Commission's Policy Statement in *Ex Parte MC-156*. (P. 11a, *infra*). Tri-State appealed the Review Board's decision. In addition, petitioners ATA and the IBT filed petitions to intervene and for administrative review, contending that the Review

Board's grant to DRGW should be overturned because the Commission's blanket abandonment of limitations on the authority of railroads to engage in motor carriage was contrary to law.

The Commission's final decision first denied ATA's and the IBT's petitions to intervene, stating that the attack on the validity of the elimination of the "special circumstances" doctrine "would unduly broaden the issues raised in this proceeding." (P. 15a, *infra*). Second, on the basis of its prior Policy Statement, the Commission rejected the argument that unrestricted trucking authority could not be granted to a rail carrier absent a showing of "special circumstances" (P. 16a, *infra*).

2. *Proceedings Before The Court Of Appeals*

Tri-State and ATA petitioned for review of the ICC's decision in the court below. The IBT, which represents Tri-State employees, intervened in support of that petition. DRGW intervened on the side of the ICC and the United States in support of the agency decision.

Before the Court of Appeals, the Commission argued that the Court was without jurisdiction to entertain petitioners' challenge to its failure to require a showing of "special circumstances" because the correctness of that decision was reviewable only on direct appeal from the rulemaking proceeding in which the Commission first announced its intention to abandon the "special circumstances" doctrine; that the doctrine of collateral estoppel barred litigation of that issue by petitioners below; and that the 1980 amendments to the Interstate Commerce Act justified the Commission's policy shift. The Court of Appeals rejected the Commission's attack on its jurisdiction (p. 4a, n.2, *infra*), and found it unnecessary to reach the Commission's collateral estoppel argument. (P. 2a, n.1, *infra*). On the merits, the Court of Appeals acknowledged that in *American Trucking Assns. v. U.S.*,

364 U.S. 1, this Court had held that "Congress has expressed a strong general policy against railroad invasion of the motor field," and that this policy prohibited the Commission from granting general trucking authority to rail carriers absent a finding of "special circumstances." (P. 6a, *infra*, quoting 364 U.S. at 6 and 15). Nonetheless, the Court concluded that "when the Act is read as a whole, including the 1980 amendments, the ICC had proper authority to find that the special circumstances doctrine should no longer be recognized." (P. 6a, *infra*). On that basis, the Court of Appeals affirmed the ICC's order.

Although it had achieved total success by the Court's affirmance, the Commission petitioned for rehearing and rehearing en banc, contending that the case should have been decided in its favor on either jurisdictional or collateral estoppel grounds. After directing and receiving a response from the petitioner below, the Court of Appeals denied the Commission's petition. (P. 8a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A SERIES OF DECISIONS OF THIS COURT AND WITH A LONGSTANDING, UNALTERED CONGRESSIONAL POLICY

A. The court below declared that the "central issue [in the Fifth Circuit], and here, is whether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required." (P. 4a, *infra*). The Eighth Circuit (like the Fifth Circuit on review of the Policy Statement) answered that question in the negative, and accordingly concluded that the ICC was authorized to abandon that doctrine.[2] The issue thus defined is "central"

---

[2] Although the point is not decisive herein, we note that the observation that the doctrine "was created by the ICC" is, in our view, correct only with respect to licensing. The restriction on

also in considering whether the judgment below should be reviewed, because if the Court of Appeals was wrong, it "has decided a federal question in a way in conflict with applicable decisions of this Court." (U.S. Sup. Ct. Rule 17.1(c)). We therefore shall show that the court below has misinterpreted this Court's governing decision; analysis and holdings in those cases made clear that the "special circumstances" doctrine embodies a Congressional policy. (Indeed, years ago, the ICC itself so acknowledged in a submission to this Court, quoted at pp. 14a-15a, *infra*). The most revealing of this Court's decisions is *American Trucking Assns. v. U.S.*, 364 U.S. 1 (*"ATA II"*), which we therefore discuss in some detail.

At the outset of his analysis for a unanimous Court, Chief Justice Warren began: "Both the Commission and this Court have recognized that *Congress* has expressed a strong general policy against railroad invasion of the motor carrier field," referring to the National Transportation Policy, 54 Stat. 899, and the proviso to § 5(2)(b) of the Interstate Commerce Act. (364 U.S. at 6, emphasis added.)

The Court observed:

> The Commission long ago concluded that the policy of the transportation legislation requires that the

---

railroad acquisitions of motor carriers first appeared in the proviso to § 213(a) of the 1935 Act. Commissioner Eastman's subsequent description of the 1935 legislative process, quoted in *Rock Island* at 340 U.S. 431-432, n.9, made clear that this proviso was intended to confine such acquisitions to those which would be used by the acquiring carrier in its railroad operations. *Pennsylvania Truck Lines, Inc.-Control-Barker*, 1 M.C.C. 101 (1936), in which Mr. Eastman joined, implemented that Congressional decision. See p. 4, *supra*, and 340 U.S. at 433, n.11. See also *Pennsylvania Truck Lines, Inc.*, 5 M.C.C. 9 (1937). It was, however, the ICC which initially extended the doctrine to licensing proceedings, in the *Kansas City Southern* case, 10 M.C.C. 221, described at p. 4, *supra*. The doctrine was ratified by Congress with respect to both acquisitions and licensing proceedings by the 1940 Act, and thereby became *Congressional* policy as to both.

> standards of § 5(2)(b)—then § 213(a) of the Motor Carrier Act of 1935, 49 Stat. 555—be followed as a general rule in other situations, notably in applications for common carrier certificates of convenience and necessity under § 207.[4] *Kansas City Southern Transport Co., Common Carrier Application,* 10 M.C.C. 221 (1938). And this Court has confirmed the correctness of the Commission's conception of its responsibilities under both § 5(2)(b) and § 207. See *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419; *United States* v. *Texas & Pacific Motor Transport Co.,* 340 U.S. 450; *Interstate Commerce Comm'n* v. *Parker,* 326 U.S. 60. The Court has also taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in § 5(2)(b) of the provisions of § 213(a), after some of the pertinent Commission decisions had been specifically called to Congress' attention. See *United States* v. *Rock Island Motor Transit Co., supra,* at 432. [364 U.S. at 6-7, emphasis added] [3]

Thus, "the policy of opposition to railroad incursions into the field of motor carrier service" (364 U.S. at 7) was plainly viewed as *Congress'* policy. So, too, in approving the Commission's implementation of that policy to restrict "certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service," the Court said:

> If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of

---

[3] In *Rock Island,* the Court expressly identified *Kansas City Southern Transport Co., supra,* as one of the cases "which were specifically called to Congress' attention prior to the enactment of the 1940 Act." 340 U.S. at 432 and n.10.

> trucking, and, under normal circumstances, the National Transportation Policy is thereby offended. [364 U.S. at 9, emphasis in original]

The Court reaffirmed its holdings in *ATA I* that the public interest may sometimes be promoted by not imposing the "auxiliary and supplemental" restrictions on motor carrier subsidiaries of railroads, but that this exception has only a narrow scope:

> We there observed that the mandatory provisions of § 5(2)(b) do not appear in § 207, and approved the Commission's policy of not attaching auxiliary and supplemental restrictions where "special circumstances" prevail. We concluded:
>
> > "We repeat . . . that the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But . . . we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding." 355 U.S., at 151-152. [364 U.S. at 11]

Because the ICC had granted to a railroad subsidiary motor carrier authority without attaching "auxiliary and supplemental" restrictions, and without making a finding of "special circumstances," this Court *set aside* the ICC's decision, saying:

> [W]e do not believe that the policy of the Act allows the Commission to authorize service by Pacific Motor, limited only to points on the Southern Pacific line, simply because General Motors [the shipper] wants a contract carrier operation. If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy. This consequence, we believe,

> does not meet the compelling public interest standard established by [*ATA I*]. A contrary conclusion would open the door to approval of over-the-road contract trucking by railroad subsidiaries to most, if not virtually all, major destinations, and hence would greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking. Appellees say that these safeguards are no longer needed, because independent trucking is no longer an "infant industry." This is an immaterial argument in this forum. *We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress.* [364 U.S. at 15, emphasis added]

The Court concluded:

> Thus the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law. [364 U.S. at 15] [4]

The proposition that the "special circumstances" doctrine is merely a matter of agency policy simply cannot be reconciled with either the reasoning of the *ATA II* opinion, or the result in that case. There was a time when the ICC, too, understood the correct meaning of this Court's decisions. It represented to this Court at the 1974 Term:

> It has long been established that the *Congressional* "policy of opposition to railroad incursions into the field of motor carrier service" (*American Trucking Associations, Inc. v. United States*, 364 U.S. 1, 7) usually limits any motor carrier service performed by a railroad affiliate or subsidiary to service auxiliary or supplemental to its rail service. See *United States v. Rock Island Motor Transit Co.*, 340 U.S.

---

[4] The Court remanded the case to the ICC to consider whether the record would support a finding that there exist special circumstances warranting an unrestricted certificate. (364 U.S. at 15-17.)

> 419. An unrestricted certificate, authorizing motor service unrelated to the railroad parent's rail service and in competition with independent truckers, may be granted only where "special circumstances" prevail.[5]

The meaning of the cited opinions has not changed in the intervening years.

B. The ICC and the court below relied on the 1980 amendments to the Interstate Commerce Act as justifying the abandonment of the "special circumstances" doctrine. But Congress did not in that legislation exercise its "pardoning power" (364 U.S. at 15) to ease the restrictions on the motor carrier operations of railroads and their subsidiaries. That portion of the National Transportation Policy "which articulates the congressional purpose that the Act be 'so administered as to recognize and preserve the inherent advantages' of 'all modes of transportation'" (364 U.S. at 6), remains in the Act as 49 U.S.C. § 10101(a)(1)(A). (P. 19a, *infra*). So too, what was § 5(2)(b) of the Interstate Commerce Act (364 U.S. at 6-7, 9, 11) is retained as 49 U.S.C. § 11344(c). (P. 27a, *infra*).

The new licensing standards established by 49 U.S.C. §§ 10922 and 10923 do not affect the result. To be sure, these "markedly reduce the burden of proof of those seeking motor carrier authority and substantially increase the burden of proof of those opposing the issuance of motor carrier authority".[6] But careful examination of the ICC's formulation of the "special circumstances" doctrine in *Rock Island*, which this Court has twice approved, see pp. 5-6, *supra*, makes clear that this change does not affect its statutory underpinnings. By

---

[5] Motion to Affirm, p. 3 in No. 74-515, *B-H Transfer Co. v. United States* (emphasis added). The motion to affirm was granted, 420 U.S. 968.

[6] *Ex Parte MC-156*, 132 M.C.C. at 979.

virtue of the new licensing provisions, a railroad applicant, in common with all others, is relieved of the obligation to prove "that its service is required by public convenience and necessity" (340 U.S. at 428, n.4; 355 U.S. at 151). But the new licensing provisions do *not* affect the railroad applicant's "special burden" imposed "by reason of the very circumstance that it is a railroad * * * to show special circumstances negativing any disadvantage to the public from this fact * * *." (*Id.*) *That* burden, which derives from provisions of the Interstate Commerce Act which were not changed, remains because, however desirable the change might appear to the ICC, "Congress' policy has not yet moved to this point." Cf. *Labor Board v. Insurance Agents*, 361 U.S. 477, 500.[7]

---

[7] A railroad spokesman, testifying in general support of an early version of what became the Staggers Rail Act, discussed the "special circumstances" doctrine, and criticized as a significant "omission" the failure of the bill to overturn that doctrine.

Walter G. Treanor, senior vice-president-law of The Western Pacific Railroad Company, testified:

> Insofar as the bill [S. 796] is concerned, we have only one concern of omission, although we understand the reason for it at this time, and this is that *this bill does not propose to strike down the artificial restraints that are in the present statute on the railroads becoming total transportation companies.* . . . [A]s a direct consequence of legislative and administrative restrictions, the railroads with a few notable exceptions are generally effectively foreclosed from engaging in common carrier motor services except where such services are structured so as to be strictly auxiliary of, and supplemental to, the existing rail lines. *Statutory limitations presently set forth in 49 U.S.C. (Transportation) 11344 require special, and debilitating, findings before any railroad is permitted to effect a merger with, or control of, a motor carrier.* Although there do not exist any similar statutory restrictions with regard to railroad applications to obtain a Certificate of Public Convenience and Necessity to commence a new motor carrier operation, the *Interstate Commerce Commission, at least until very recently, has as a matter of policy imposed similar restrictions in certification cases.* We are very much encouraged by the [ICC's]

II. THE QUESTION IS IMPORTANT TO THE ECONOMIC HEALTH OF THE MOTOR CARRIER INDUSTRY

In *Rock Island*, this Court succinctly stated the economic reason why the "auxiliary and supplemental" limitation on railroad motor carrier operations was in furtherance of the National Transportation Policy:

> [O]therwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation. [340 U.S. at 432-433, footnote omitted]

If the decision below is permitted to stand, the way for rail domination of land transportation will have been cleared. Despite substantial significant changes in the trucking and railroad industries (to which Congress responded with the 1980 amendments) the power of the railroads to dominate the motor carrier field if their entry is unrestricted is undiminished. They possess vast

---

recent loosening of such restrictions in non-merger cases but *legislative changes are necessary if this program is to have any assurances of continuation into the future.*

Railroad Deregulation Act of 1979: Hearings on S. 796 Before the Senate Subcomm. on Surface Transportation of the Sen. Comm. on Commerce, Science and Transportation, 96th Cong., 1st Sess. 221, 223-224 (Part I, 1979) (emphasis added.)

No subsequent change was made in § 11344 to meet Mr. Treanor's ob[illegible]ion. But the ICC has given that which Congress withheld.

economic resources which enable them to undertake motor carrier operations where to do so would serve their corporate objectives. For example, the four largest United States transportation companies, ranked by assets, are railroads; the largest trucking company ranks twenty-first. Seven railroad corporations have assets of more than $1 billion (including three with assets of more than $10 billion); only one trucking company has more than $1 billion in assets. (See Table I, p. 28a, *infra*). Ranking these transportation companies by annual operating revenues likewise illustrates the superior economic power of the railroads: the top fifteen include four railroads, but no trucking company. Those four railroads each earn over $3 billion annually, while the largest trucking company earns only $1.3 billion. (See Table II, p. 29a, *infra.*)

The Commission now believes that unrestricted competition by railroads in the motor carrier field is desirable and has abandoned the "special circumstances" restrictions to accomplish that result. We submit that the Commission has thereby committed an error of law, and that the court below should have so held. See pp. 10-16, *supra.* But whatever doubt there may be on that score, it cannot be gainsaid that the decision below portends a drastic transformation of the motor carrier industry and of rail-motor competition generally. For this reason, too, plenary review of the decision below is clearly warranted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM S. BUSKER
KENNETH E. SIEGEL
2200 Mill Road—Room 823
Alexandria, VA 22314
(703) 838-1857
Attorneys for Tri-State Motor Transit Co., and American Trucking Associations, Inc.

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOSEPH E. KOLICK, JR.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for International Brotherhood of Teamsters, Etc.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 83-2564

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
Intervenor/Respondent.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
Intervenor.

Submitted May 17, 1984

Decided Aug. 3, 1984

Rehearing and Rehearing En Banc
Denied Oct. 26, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

LAY, Chief Judge.

Tri-State Motor Transit (Tri-State) contested the application before the Interstate Commerce Commission (ICC) of unrestricted motor carrier operations for the Denver and Rio Grande Western Railroad Co. American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) unsuccessfully sought to intervene before the ICC in opposition of the application. Tri-State, ATA, and the Teamsters now ask this court to set aside ICC's grant to Denver/Rio Grande of unrestricted motor carrier operations. We affirm the order of the ICC.[1]

---

[1] ICC and Denver/Rio Grande argue that Tri-State et al. are estopped from challenging the Commission's order on the basis of collateral estoppel. ATA and the Teamsters very well may be estopped from such a challenge based on their participation in a similar challenge of the same issue before the Fifth Circuit. *American Trucking Ass'ns, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). Additionally, Tri-State may be estopped because of its privity with ATA; Tri-State is a member of the Association. *Western Coal Traffic League v. I.C.C.*, 735 F.2d 1408, at 1411 (D.C. Cir. 1984), supports this view. Since we approve the grant of the certificate, we need not pass on the estoppel argument.

We also find no abuse of discretion in the ICC's denial of intervention for ATA and the Teamsters in the ICC proceeding. The decision whether to grant a petition to intervene before the ICC is governed by statute, 49 U.S.C. § 10922(b)(7), and by regulation, 49 C.F.R. § 1112.4. The latter states that intervention "may" be granted so long as it does not unduly disrupt or broaden the issues raised in the proceeding. In denying leave to intervene, the ICC stated:

> The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4] and in effect constitutes a collateral attack on Ex Parte No.

The unrestricted motor carrier operations granted to Denver/Rio Grande allows the railroad to engage in unlimited trucking operations. Historically, the ICC restricted rail-affiliated motor carriers to operations "auxiliary to or supplemental of" the rail operations of the company, unless the particular rail-affiliated trucking company could demonstrate special circumstances justifying an exception to the general rule. This general rule and exception thereto was known as the "special circumstances doctrine," and required that motor carrier operating authority for railroads be restricted to incidental rail service unless unrestricted authority was required to fulfill a compelling public need for service not being offered by independent motor carriers. The purpose of the special circumstances doctrine was to prevent rail domination of motor carrier markets.

In 1982 the ICC abrogated the special circumstances doctrine in Ex Parte No. MC-156, *Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982). This decision was made in light of amendments to the Interstate Commerce Act—the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980. The ICC concluded that, in light of the 1980 amendments, a rail-affiliated trucking company no longer needs to prove special circumstances to justify an unrestricted grant of authority. ATA and the Teamsters unsuccessfully challenged the ICC decision before the Fifth Circuit. *American Trucking Associations v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). The Fifth Circuit concluded that the ICC was within its authority when it abolished

---

MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals [for the Fifth Circuit].

Interstate Commerce Commission Decision No. MC-166474 (Sub-No. 1) (Nov. 8, 1983). We find no error in this ruling.

the special circumstances doctrine, noting especially the changes in the trucking and rail industries and the Interstate Commerce Act.

On appeal to this court, Tri-State, ATA, and the Teamsters argue that the Interstate Commerce Act precludes the ICC from removing all special limitations on the licensing of railroads to engage in motor transportation. Therefore, contends Tri-State et al., the ICC was without authority to remove the special circumstances doctrine from its licensing procedure, and the Fifth Circuit was in error in affirming the ICC decision.[2]

The Fifth Circuit extensively reviewed the history of the special circumstances doctrine in its opinion. *See* 722 F.2d at 1244-47. The central issue there, and here, is whether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required. Prior to the passage of the Motor Carrier Act of 1935, the trucking industry was economically unstable and dominated by ease of competitive entry. The special circumstances rule arose from the

---

[2] The ICC argues that, considering the Fifth Circuit's affirmance of Ex Parte No. MC-156, this court does not have jurisdiction to review a subsequent challenge on the substantive validity of an agency's rules. This argument is based on the Hobbs Act, which provides that a party aggrieved by a rule, regulation, or final order of the ICC must file a petition for judicial review within sixty days. 28 U.S.C. §§ 2342, 2344. We agree that this rule now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959)).

Act itself and was intended to protect the motor transportation system from over competition.

The explicit Congressional restriction on rail-affiliated trucking companies was the enactment of high barriers to rail companies' *acquisition* of trucking companies. Motor Carrier Act of 1935, § 213(a), currently at 49 U.S.C. § 11344(c).[3] The implicit Congressional restriction was recognizing and preserving "the inherent advantages" of each mode of transportation. Motor Carriers Act of 1935, § 202(a), currently at 49 U.S.C. § 10101(a). In contrast to the acquisition provisions, the licensing provisions did not provide for any restrictions on rail companies' operations of trucking companies. However, the ICC interpreted the acquisition provisions of § 11344(c) to mean that not only could railroads not acquire, but that they could not operate as unrestricted trucking companies. The ICC additionally interpreted the National Transportation Policy's requirement of preserving the inherent advantages of each mode as support for protection of the infant trucking industry from the railroads. In *I.C.C. v. Parker*, 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051 (1945), and later in *United States v. Rock Island Co.*, 340 U.S. 419, 71 S.Ct. 382, 95 L.Ed. 391 (1951), the Supreme Court affirmed the ICC's power to restrict the licensing of rail-affiliated trucking companies.

The ICC modified its restrictions on the licensing of trucking operations for rail companies in *Rock Island Motor Transit Co. Common Carrier Application*, 63 M.C.C. 91 (1954). The ICC held that unrestricted authority

---

[3] Section 11344(c) provides in pertinent part:

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transportation involves a motor carrier, the Commission may approve and authorize the transportation only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

could be granted to a rail-affiliated trucking company if the rail affiliate could prove that the grant would not restrain competition and that the public interest required the proposed service. This policy was the "special circumstances" exception and the Supreme Court affirmed its use in *American Trucking Associations v. United States*, 355 U.S. 141, 78 S.Ct. 165, 2 L.Ed.2d 158 (1957). The Supreme Court noted that the licensing and acquisitions sections were interpretive brothers, and stated that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.'" *Id.* at 151-52, 78 S.Ct. at 171.

In *American Trucking Associations v. United States*, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed.2d 1527 (1960), the ICC had granted operating licenses to a trucking company that was a wholly owned subsidiary of a railroad. ATA challenged the grant, claiming that the ICC did not properly apply the special circumstances doctrine. The Supreme Court agreed, finding that "[b]oth the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor field," *id.* at 6, 80 S.Ct. at 1574, and concluding that the ICC had deviated from this policy by granting operating authority to a railroad subsidiary without finding special circumstances. *Id.* at 15, 80 S.Ct. at 1578.

Tri-State now urges that the principles of *American Trucking* are violated by the ICC's grant of operating licenses to the Denver/Rio Grande. We must disagree. The ICC was charged by the Supreme Court with applying the Act "as a whole." We believe that when the Act is read as a whole, including the 1980 amendments, the ICC had proper authority to find that the special circumstances doctrine should no longer be recognized.

Specifically, the amendments established "a new Federal policy which is designed to promote a competitive and

efficient motor carrier industry." H.R. Rep. No. 1069, 96th Cong., 2d Sess. 14 (1980). The legislation mandated eased regulatory entry requirements in order to increase "opportunities for new carriers to get into the trucking business and for existing carriers to expand their services." *Id.* at 3. Moreover, Congress found that "today most transportation is competitive and many Government regulations affecting railroads have become unnecessary and inefficient." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4111. *See generally American Trucking Associations v. I.C.C.* 722 F.2d 1243, 1249-52 (5th Cir. 1984) (detailing the deregulatory approach of the 1980 amendments). We therefore agree with the ICC and the Fifth Circuit *ATA* decision, *id.*, that the showing required under the special circumstances doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act.

For the above reasons, the decision of the ICC is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 83-2564

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REVIEW OF ORDER OF THE INTERSTATE COMMERCE COMMISSION

Respondents' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 26, 1984

APPENDIX C

Service Date
Sep. 8, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY EXTENSION—POINTS IN THE UNITED STATES (Denver, CO)

Decided: August 26, 1983

Applicant seeks a certificate authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. Tri-State Motor Transit Co. opposes the application.

Applicant holds no existing authority from this Commission. It argues that a grant of the proposed authority will enhance the competitive environment and will promote a safe and sound intermodal transportation system.

The application is supported by 27 shippers. They are The John Sexton Co., Morton Salt Division of Morton Thiokol, Inc., The Quaker Oats Company, and Gee Co., all of Chicago, IL; Packaging Corporation of America of Evanston, IL; Grain Processing Corporation of Muscatine, IA; F. Korbel and Brothers of Guerneville, CA; American Timber Products, Inc., of Oklahoma City, OK; Nobel/Sysco Food Services Co., Association Grocers of Colorado, Inc., Keebler Company and McKesson Wine and Spirits Co., all of Denver, CO; American Excelsior Corp. of Arlington, TX; Alpine Lumber Co. and Husky Oil Company of Englewood, CO; Pacific Coast Producer's of Santa Clara, CA; Slaughter Brothers, Inc. and Lennox Industries, Inc., of Dallas, TX; Alamaden Vineyards of San Jose, CA; The Dorris Lumber & Mouldings

Co. and Western Bark Sales, Inc., of Sacramento, CA; Trammell Crow Distributions Corporation and National Distribution Systems of Clearfield, UT; Gonzalez & Company, Inc., of Gonzalez, CA; Gerber Products Company of Fremont, MI; American Forest Products Co., and United Vinters Inc., of San Francisco, CA. Collectively, shippers require service on a wide variety of commodities including air conditioners, foods and food products, boxes, pulpwood and paper products, cleaning compounds, plastic articles, wines, lumber and lumber products and appliances. All of the shippers have described the commodities to be transported, the volume to be tendered applicant, and problems with existing service. Representative origin and destination points are shown by most of the shippers. Others indicate customers are located throughout the 48 contiguous States. A number of shippers require insulated equipment, while several require high cube van equipment. A large number of shippers support the instant application in order to shift transportation services from rail to motor common carriage. Shippers currently using motor common carriers generally express a need to have additional equipment available and an opportunity to use a carrier with a more competitive rate structure.

Tri-State holds authority to transport general commodities between points in the United States, operates 1,164 tractors and 2,585 trailers, and contends that a grant of this application would have a detrimental effect upon its operations. Tri-State, in 1982, generated approximately $64 million in revenue which assertedly would be subject to diversion by a grant of the application. Protestant claims that the diversion of any meaningful portion of this traffic would have a disastrous effect upon its operations; it suffered a loss of $799.00 in 1982. Tri-State notes that its traffic was down 20 percent in 1982, that it currently had idle equipment throughout its system, and it attributes this decrease in business to the more liberal

entry policy of the Commission. Further diversion and lack of traffic, we are told, will result in further closing of terminals and additional layoffs in personnel. It believes that the application should be denied in view of applicant's failure to provide "special circumstances".

On the record before us, we find that applicant has met its threshold burden. A representative showing is all that is required, and the specific commodities, origins and destinations named are sufficiently representative of the authority sought by the 27 supporting shippers.

Tri-State has not shown that a grant of authority to applicant would harm its overall operations to an extent injurious to the public interest. So long as it provides reasonable service and competitive rates, there is no reason to assume that its traffic would be diverted by applicant. Furthermore, Tri-State has done little to show that a grant of the application would be inconsistent with the public convenience and necessity, merely citing potentially divertible traffic and revenues from increased competition. This factor, in and of itself, cannot, under the Motor Carrier Act of 1980, be made the basis for a denial of authority otherwise adequately supported by the record.

Finally, contrary to protestant's contentions, a railroad need no longer demonstrate "special circumstances" in order to obtain unrestricted motor carrier authority. *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing and able properly to perform the granted service and to conform to statutory and administrative requirements. This action will not significantly affect either

the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a *certificate* and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

By the Commission, the Review Board, Members Carleton, Parker, and Krock.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), betwen points in the United States (except Alaska and Hawaii).

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

Service Date

Nov. 15, 1983

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, EXTENSION—POINTS IN THE UNITED STATES (Denver, CO)

Decided: November 8, 1983

We have considered the application and the record in this proceeding, the appeal filed by protestant Tri-State Motor Transit Co., the petitions to intervene filed by American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), and applicant's reply.

The ATA and Teamsters here renew their challenge to the legality of the elimination of the "special circumstances" doctrine in Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).[1]

---

[1] The "special circumstances" doctrine allowed a departure from the requirements of imposing auxiliary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail affiliated applicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. Ex Parte No. MC-156, *supra*, at 981. The doctrine was eliminated to make it easier for railroads and rail affiliates to obtain unrestricted motor carrier authority.

This issue is pending before the United States Court of Appeals for the Fifth Circuit in *American Trucking Associations, et al. v. I.C.C., et al.*, No. 83-4039. They contend that they should be allowed to intervene in this proceeding in order to "maintain the integrity of the licensing procedures" of this Commission and compliance with "the regulatory scheme set forth by Congress in the Interstate Commerce Act."

The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4.] and in effect constitutes a collateral attack on Ex Parte No. MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals.

By decision served September 8, 1983, the Review Board granted applicant's request to transport general commodities (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii). The Board held that a railroad need no longer demonstrate "special circumstances" in order to obtain unrestricted motor carrier authority, citing Ex Parte No. MC-156, *supra*.

Protestant does not challenge whether applicant has met the criteria of 49 U.S.C. 10922 or established a need for the proposed service. Rather, it contends that the authority should not be granted since applicant failed to establish "special circumstances." Protestant is con-

cerned that the granting of this application will result in the filing of similar applications by other rail carriers and their affiliates while the review of Ex Parte No. MC-156 is pending in Court. It requests us to (1) issue a notice or order that, pending final decision by the Court, applications filed under Ex Parte No. MC-156 will be held in abeyance or not accepted for filing until further order; or (2) attach a condition limiting any certificates granted in those proceedings to the lesser of (a) a term of one year from its issuance, or (b) reconsideration of the proceeding based on the final decision by the Court.

The Fifth Circuit Court of Appeals has not issued a stay of the rules in Ex Parte No. MC-156 pending its review of that proceeding. Accordingly, there is no legal impediment to rendering a decision in this application proceeding. We see no valid reason to either hold this case or other similar cases in abeyance or to impose a condition on the certificates to be issued. Ex Parte No. MC-156 is quite clear that a railroad need no longer demonstrate "special circumstances." Therefore, we will not reverse the Review Board decision. For reasons stated above, protestant's attack on the validity of the elimination of the "special circumstances" doctrine constitutes an inappropriate issue to consider here.

The Review Board correctly found that applicant has established a need for the proposed service. The application is supported by 27 shippers which require service for a wide variety of commodities throughout the 48 contiguous states. Those using motor carriers expressed a need to have more service available. Only one protestant opposed the application. Protestant did not show that a grant of the application would be inconsistent with the public convenience and necessity.

The grant of the requested authority will allow improved and innovative service through the combined use of piggyback, motor, and rail service by one carrier. In addition to promoting intermodal service, the granted au-

thority should afford shippers a new and efficient service option.

It is ordered:

The petitions to intervene of the American Trucking Associations, Inc., and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are denied.

Protestant's appeal is denied because the findings of the Review Board are in accordance with the evidence and the applicable law.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

This decision will take effect 25 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Andre, Taylor, and Sterrett. Commissioner Taylor is assigned to this Division for the purpose of resolving the votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii).

APPENDIX E

The pertinent provisions of the Interstate Commerce Act as amended by the Motor Carrier Act of 1980, P.L. 96-296, 94 Stat. 793, *et seq.* and the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 *et seq.* are as follows:

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transpor-

tation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases,

and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 84 Stat. 1897.

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(a) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle. Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-448, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter III of

chapter 105 of this title as a water common carrier if the Commission finds that—

(1) the person is fit, willing and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

* * * *

(i) (1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

* * * *

(k) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

* * * *

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1409; Pub.L. 96-296, §§ 5(a), 6, 34(a), July 1, 1980, 94 Stat. 794, 796, 825; Pub.L. 96-454, § 10(a), Oct. 15, 1980, 94 Stat. 2021; Pub. L. 97-261, §§ 6(a)-(c), (g), 7, 8, Sept. 20, 1982, 96 Stat. 1103, 1107, 1108.

§ 10923. Permits of motor and water contract carriers and freight forwarders

(a) Except as provided in this section and section 10930 of this title, the Interstate Commerce Commission shall issue a permit to a person authorizing the person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor contract carrier or water contract carrier, respectively, or to provide service subject to that jurisdiction under subchapter IV of chapter 105 as a freight forwarder, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation or service to be authorized by the permit; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation or service to be provided under the permit is or will be consistent with the public interest and the transportation policy of section 10101 of this title.

* * * *

(e) A motor contract carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1410; Pub.L. 96-258, § 1(9), June 3, 1980, 94 Stat. 426; Pub.L. 96-296, §§ 10(a)(2), (3), 34(b), July 1, 1980, 94 Stat. 799, 800,

825; Pub. L. 97-261, § 13(a), Sept. 20, 1982, 96 Stat. 1114.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

* * * *

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

* * * *

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1436; Pub.L. 96-448, Title II, § 228(a)-(c), Oct. 14, 1980, 94 Stat. 1931; Pub.L. 97-261 § 21(f), (g), Sept. 20, 1982, 96 Stat. 1123.

APPENDIX F

THE FIFTY LARGEST TRANSPORTATION COMPANIES

(Source: Fortune Magazine, June 11, 1984, pp. 188-189)

TABLE I—TRANSPORTATION COMPANIES RANKED ACCORDING TO ASSETS

Rail

Company	*Rank*	*Assets*
Santa Fe Southern Pacific	1	$11.4B
Burlington Northern	2	$10.9B
CSX	3	$10.8B
Norfolk Southern	4	$ 8.2B
Illinois Central Gulf RR	15	$ 1.9B
Chicago & North Western Transportation	19	$ 1.3B
Chicago Milwaukee St. Paul & Pacific RR	25	$ 1.0B
Rio Grande Industries	32	$ .8B
Kansas City Southern Industries	34	$ .7B

Motor

Company	*Rank*	*Assets*
McLean Industries	21	$ 1.1B
Consolidated Freightways	27	$ .9B
Roadway Services	30	$ .8B
Yellow Freight System	39	$ .6B
Overnite Transportation	43	$ .2B
Arkansas Best	44	$ .2B
Carolina Freight	45	$ .2B
American Carriers	47	$ .1B

TABLE II—TRANSPORTATION COMPANIES RANKED ACCORDING TO OPERATING REVENUES

Motor Company	Rank	*Operating* Revenue
Santa Fe Southern Pacific	1	$6.3B
CSX	4	$5.7B
Burlington Northern	6	$4.5B
Norfolk Southern	11	$3.1B
Illinois Central Gulf RR	25	$ .9B
Chicago & North Western Transportation	28	$ .9B
Kansas City Southern Industries	42	$ .4B
Chicago Milwaukee St. Paul & Pacific RR	44	$ .4B
Rio Grande Industries	46	$ .3B

Rail Company	Rank	*Operating* Revenue
Consolidated Freightways	16	$1.3B
Roadway Services	19	$1.2B
Yellow Freight System	22	$1.1B
McLean Industries	30	$ .8B
Arkansas Best	36	$ .5B
Overnite Transportation	47	$ .3B
Carolina Freight	48	$ .3B
American Carriers	50	$ .3B

Office - Supreme Court, U.S.
FILED
APR 24 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

SAMUEL R. FREEMAN
Vice President and General Counsel
JOHN S. WALKER
General Solicitor
THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY
P. O. Box 5482
Denver, Colorado 80217

JOHN H. CALDWELL
DENISE M. O'BRIEN
(Counsel of Record)
HAMEL & PARK
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202/835-8095
Attorneys for
The Denver and Rio Grande
Western Railroad Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether parties who were unsuccessful in challenging an Interstate Commerce Commission policy change that removed artificial constraints against railroads' acquiring unrestricted motor common carrier authority are foreclosed from reviving their substantive arguments in a licensing proceeding in which the policy was applied.

2. Whether the court of appeals' decision was properly based on the conclusion that an agency-created doctrine that formerly required railroads to demonstrate "special circumstances" in advance of receiving unrestricted motor carrier authority did not accord with current economic conditions or Congressional policies favoring competition.

PARTIES TO THE PROCEEDING BELOW

Tri-State Motor Transit Company

American Trucking Associations, Inc.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Interstate Commerce Commission

United States of America

The Denver and Rio Grande Western Railroad Company

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Preliminary Statement with Respect to the Petition in No. 84-1515	7
Summary of Argument	7
Reasons for Denying the Petition in No. 84-1518	8
I. Petitioners Have Failed to Present Any Significant Legal Issue Warranting Review by This Court	8
II. Petitioners Have Failed to Prove Their Contention that the Decision Below Has Any Substantial Economic Impact; Even If Such a Showing Were Made, However, Petitioners' Arguments Do Not Warrant Review by This Court	10
Conclusion	11

TABLE OF AUTHORITIES

Cases Page

American Trucking Ass'ns, Inc. v. ICC, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984) 3, 7, 8, 9, 10

American Trucking Ass'ns, Inc. v. U.S., 364 U.S. 1 (1960) 3, 9

The Denver and R. G. W. R.R., Extension—Points in the United States (Denver, CO), Docket No. MC-166474 (Sub-No. 1), decision served November 15, 1983 4

The Denver and R. G. W. R.R., Extension—Points in the United States (Denver, CO), Docket No. MC-166474 (Sub-No. 1), decision served September 8, 1983 4

Ex Parte No. MC-156, Motor Carrier Operating Authority—Railroads, 132 M.C.C. 978 (1982), *aff'd sub nom. American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984) 3, 5, 7, 11

Ex Parte No. 438, Acquisition of Motor Carriers by Railroads, entire Commission decision served July 27, 1984, *petition for review docketed sub nom. American Trucking Ass'ns, Inc. v. ICC*, No. 84-7545 (9th Cir. August 15, 1984) 6

Tri-State Motor Transit Co. v. ICC, 739 F.2d 1373 (8th Cir. 1984) 2, 6, 9

Statutes

Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. §§ 2341-2351 (1982) 2

28 U.S.C. § 2342(a) (1982) 2

28 U.S.C. § 2350(a) (1982) 2

Interstate Commerce Act,

49 U.S.C. §§ 10101-11917 (1982) 2-3

Judicial Code:

28 U.S.C. § 1254(1) (1982) 2

28 U.S.C. § 2321 (1982) 2

TABLE OF AUTHORITIES—Continued

Page

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) 3
Motor Carrier Act of 1935, Pub. L. No. 255, Ch. 498, 49 Stat. 453 (1935) 3
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) 3

Miscellaneous

46 *Fed. Reg.* 50,423 (October 13, 1981) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1518

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Respondent, The Denver and Rio Grande Western Railroad Company ("Rio Grande" or "DRGW"), opposes the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed in No. 84-1518 by the American Trucking Associations, Inc., Tri-State Motor Transit Co., and the International

Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (respectively, "ATA," "Tri-State," and "Teamsters"; collectively, "Trucking/labor petitioners"). Rio Grande takes no position with respect to the petition for a writ of certiorari filed in No. 84-1515 by the Solicitor General on behalf of the Interstate Commerce Commission ("ICC" or "Commission") and the United States (collectively, "Government petitioners").

OPINIONS BELOW

The opinion of the court of appeals (U.S. App. at 1a-8a)[1] is reported at 739 F.2d 1373. The decisions of the ICC (U.S. App. at 11a-15a, 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (U.S. App. at 9a) was entered on August 3, 1984. A timely petition for rehearing and suggestion for rehearing en banc was filed by the Government and was denied on October 26, 1984. *See* U.S. App. at 10a. On January 15, 1985, an order was entered by Justice Blackmun extending the time for filing a petition for a writ of certiorari to and including March 25, 1985. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §§ 1254(1) and 2350(a) (1982). The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. §§ 2321 and 2342(a) (1982).

STATUTES INVOLVED

The relevant provisions of the Administrative Orders Review Act of 1950 ("Hobbs Act"), 28 U.S.C. §§ 2341-2351 (1982), on which Government petitioners rely are set forth at U.S. App. at 22a-28a. The appendix to the Trucking/labor petition sets forth provisions of the In-

---

[1] For the sake of brevity and to avoid burdening the Court with duplicative filings, Rio Grande has relied on the appendices to the Government's petition, hereinafter cited as "U.S. App."

terstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982), at 18a-27a.

STATEMENT OF THE CASE

1. To comport with the regulatory changes effected by the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), the ICC announced on October 9, 1981 that it would conduct a rulemaking proceeding in order to reconsider its policy restricting grants of motor carrier licenses to railroads. *See* 46 *Fed. Reg.* 50,423 (October 13, 1981). On January 6, 1983, after notice and comment by a number of interests, including ATA, the Commission issued its final decision in *Ex Parte No. MC-156, Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982) (*"Ex Parte MC-156"*), *aff'd sub nom. American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). In its decision, the Commission abolished, in licensing proceedings, the "special circumstances" doctrine that it had created after passage of the Motor Carrier Act of 1935, Pub. L. No. 255, Ch. 498, 49 Stat. 453 (1935), to protect the nascent motor carrier industry from possible encroachment by rail carriers.[2]

2. On April 6, 1983, Rio Grande, a railroad providing service within the States of Colorado, Utah, Kansas, and Missouri, applied for unrestricted motor common carrier authority in accordance with the *Ex Parte MC-156* policy change. To support its application, Rio Grande sub-

---

[2] The "special circumstances" doctrine allowed grants to railroads of unrestricted motor common carrier operating authority only if it could be shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service, which existing carriers had not offered except where it suited their convenience. *See American Trucking Ass'ns, Inc. v. U.S.*, 364 U.S. 1 (1960). The Commission identified the "aim" of the doctrine as "prevent[ion of] rail domination of motor carrier markets." *Ex Parte MC-156*, 132 M.C.C. at 978.

mitted statements from 27 large shippers, all of whom had used Rio Grande's rail service or its restricted motor carrier service.

Only Tri-State Motor Transit Co. ("Tri-State"), a large general commodities carrier, protested Rio Grande's application. Tri-State filed a perfunctory protest alleging that a grant of motor common carrier authority to Rio Grande would harm Tri-State's operations. Tri-State also maintained that Rio Grande was compelled to demonstrate "special circumstances" in advance of receiving a license, disregarding the Commission's decision to discontinue reliance on that policy. In reply, Rio Grande pointed out, *inter alia*, that Tri-State was relying on outmoded standards no longer applicable to grants of authority.

In a decision served September 8, 1983, an ICC Employee Review Board granted Rio Grande's application for nationwide motor common carrier authority to transport general commodities.[3] In denying Tri-State's protest, the Review Board held that "a railroad need no longer demonstrate 'special circumstances' in order to obtain unrestricted motor carrier authority." U.S. App. at 14a (citation omitted).

Tri-State appealed the Review Board's decision. ATA and the Teamsters filed petitions for leave to intervene and for administrative review, arguing that the grant should be overturned because the Review Board had declined to require Rio Grande to demonstrate "special

---

[3] Specifically, the Commission approved Rio Grande's request to transport general commodities (except Classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii). Docket No. MC-166474 (Sub-No. 1), *The Denver and R. G. W. R.R., Extension—Points in the United States (Denver, CO)*. The certificate of public convenience and necessity embodying this authority issued December 16, 1983 and Rio Grande has been operating pursuant to its terms since that time.

circumstances" justifying issuance of an unrestricted certificate.

In a decision served November 15, 1983, the Commission denied the petitions for leave to intervene and for administrative review. U.S. App. at 18a. The Commission held that, in view of the clear policy change enunciated in *Ex Parte MC-156*, the validity of the elimination of the "special circumstances" doctrine constituted "an inappropriate issue to consider" in Rio Grande's individual application proceeding. *Id.* The Commission also held that Tri-State had not made the requisite showing that a grant of Rio Grande's application would be inconsistent with the public convenience and necessity. U.S. App. at 17a.

3. While Rio Grande's licensing application was awaiting final ICC approval, ATA and individual trucking concerns sought review of the Commission's decision in *Ex Parte MC-156* in the United States Court of Appeals for the Fifth Circuit. *See American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (1984). The Fifth Circuit phrased the issue on review as "whether the [Interstate Commerce Act] requires application of the special circumstances doctrine in all licensing proceedings" (*id.* at 1244) and held that "the Commission was within its authority in abolishing the special circumstances doctrine in licensing proceedings, ..." *Id.* at 1250.

4. Having failed to persuade the Fifth Circuit that the "special circumstances" doctrine should be revived, Tri-State and ATA sought judicial review of the Commission's decision granting Rio Grande an unrestricted license in the United States Court of Appeals for the Eighth Circuit. The Teamsters intervened to support the trucking interests.

Petitioners did not challenge the application of *Ex Parte MC-156* to Rio Grande's application. Instead, they

devoted their substantive arguments exclusively to the question "[w]hether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required." *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373, 1375 (8th Cir. 1984), U.S. App. at 5a. As Trucking/labor petitioners now concede, "[t]he Eighth Circuit (like the Fifth Circuit on review of the Policy Statement) answered that question in the negative, . . ." (Pet. at 10) and affirmed in all respects.[4]

5. The Government unsuccessfully petitioned the Eighth Circuit for rehearing and suggested rehearing en banc for reconsideration, *inter alia*, of the holding that the Hobbs Act "precludes an attack on the *procedure* by which the policy was adopted[,]" but "does not bar judicial review of the *substantive validity of the rule, even if more than sixty days have elapsed since its issuance.*" *Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1375,

---

[4] Trucking/labor petitioners agree that the removal of the "special circumstances" doctrine, which "was created by the ICC," was "correct" with respect to licensing, the only matter at issue here. Pet. at 10, n.2. This distinction is important to an understanding of the theoretical nature of petitioners' arguments to this Court. After issuance of its *Ex Parte MC-156* policy statement, the ICC conducted a rulemaking proceeding, *Ex Parte No. 438, Acquisition of Motor Carriers by Railroads*, entire Commission decision served July 27, 1984, in which it removed the requirement that railroads demonstrate "special circumstances" in order to acquire existing motor carriers. ATA and the Teamsters have sought review of this decision in the United States Court of Appeals for the Ninth Circuit. *American Trucking Ass'ns, Inc. v. ICC*, No. 84-7545 (9th Cir. August 15, 1984). Petitioners' inexplicable concession to this Court that the "special circumstances" doctrine is "statutorily-required" only with respect to acquisitions, a matter that is under review by another court of appeals (*see* Trucking/labor Pet. at 10-11, n.2), and "agency-created" with respect to licensing proceedings, the only matter resolved in *Ex Parte MC-156*, is fatally inconsistent with their arguments that the decision to grant Rio Grande an unrestricted license pursuant to that policy change conflicted with Congressional policy and Court precedent.

n.2, U.S. App. at 4a, n.2 (emphasis added). The Government then filed its petition for a writ of certiorari with this Court, seeking review of that issue. The Trucking/labor interests also filed a petition for a writ of certiorari, maintaining that the defunct "special circumstances" doctrine was "a Congressional mandate" that the ICC was not free to change or disregard. Trucking/labor Pet. at i.

6. Shortly after the Eighth Circuit rendered its decision, ATA and the Teamsters filed a petition for a writ of certiorari with this Court to obtain review of the Fifth Circuit's decision upholding the Commission's abolition of the "special circumstances" doctrine in *Ex Parte MC-156*. That petition was denied. *See* 105 S. Ct. 324 (1984).

PRELIMINARY STATEMENT WITH RESPECT TO THE PETITION IN NO. 84-1515

Rio Grande takes no position with respect to the Government's petition, which is concerned primarily with the possible effects of the decision below on the Hobbs Act's centralized judicial review procedures. The Government contends that, in view of the jurisdictional deadlines applicable to petitions for review of ICC decisions, the court of appeals should have dismissed the Trucking/labor interests' arguments for want of jurisdiction instead of reviewing the *Ex Parte MC-156* policy change and affirming the ICC's decision on the basis that removal of the "special circumstances" doctrine was correct. Because Rio Grande's license will remain intact if the Government's petition is granted and the decision below is changed in the manner suggested, it neither supports nor opposes the Government's arguments.

SUMMARY OF ARGUMENT

The decision below, which affirmed an ICC decision to grant a railroad unrestricted motor common carrier authority, followed another court's affirmance of re-

moval of an outmoded agency policy that erected artificial barriers to railroad entry to the motor carrier field. A petition for a writ of certiorari seeking review of the decision affirming the policy change, which was filed by Trucking/labor petitioners in No. 84-2518, was denied last term in No. 83-2117. *See American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984).

There is no statutory or other requirement that a railroad must show "special circumstances" in order to obtain motor common carrier authority. The decision below therefore does not conflict with prior decisions of this Court or Congressional policy. Indeed, the decision actually furthers current Congressional policies favoring competition by allowing entry of an efficient new competitor.

REASONS FOR DENYING THE PETITION IN NO. 84-1518

Rio Grande opposes the Trucking/labor petition, which should be denied summarily by this Court.

I. Petitioners Have Failed to Present Any Significant Legal Issue Warranting Review by This Court.

A. The identical arguments that Trucking/labor petitioners raise to this Court were presented in the petition for a writ of certiorari filed last term in No. 83-2117, which sought review of the judgment in *American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). In that case, the Fifth Circuit affirmed the underlying rulemaking proceeding that furnished the impetus for Rio Grande's application. Nothing has changed since these interests first petitioned for review on these issues, and their arguments do not become more persuasive upon repetition.

B. There is no conflict in the courts of appeals on the propriety of the Commission's removal of the "special

circumstances" doctrine, nor is there any departure from this Court's prior decisions. The Fifth and Eighth Circuits disagreed with the contention that the doctrine was a "Congressional mandate" to which the ICC was compelled to adhere. *See, e.g., American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1250; *Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1376. Prior precedent of this Court required that the Commission interpret the Interstate Commerce Act "as a whole"; when the Act, as amended by the Motor Carrier Act of 1980 and Staggers Rail Act of 1980, was considered "as a whole," the ICC "had proper authority to find that the special circumstances doctrine should no longer be recognized." *See id.*

C. The decision below is not inconsistent with Congressional policy. The court of appeals evaluated the Commission-created "special circumstances" doctrine in light of legislation that had eased regulatory entry requirements and concluded that the "special circumstances" showing "has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act." *Id.* at 1376. The "strong general policy against railroad invasion of the motor carrier field" that this Court recognized in *American Trucking Ass'ns, Inc. v. U.S.*, 364 U.S. 1, 6 (1960), had lost its underpinnings as a result of new Congressional policies favoring competition.

The court below thus agreed with the Fifth Circuit that no good reason existed to continue a policy that had outlived its usefulness and that was concerned with protection of the fledgling motor carrier industry. *See Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1376; *see also American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1252-53. The Fifth Circuit had concluded that the policy had been created and transformed by the ICC in light of the economic conditions that prevailed in 1935; there existed no statutory requirement that rail-

roads demonstrate "special circumstances" in advance of obtaining an unrestricted motor common carrier certificate. Because the doctrine was agency-created and transformed, no "repeal by implication" was effected by the policy change. *See id.* at 1248-49.[5]

II. Petitioners Have Failed to Prove Their Contention that the Decision Below Has Any Substantial Economic Impact; Even If Such a Showing Were Made, However, Petitioners' Arguments Do Not Warrant Review by This Court.

Trucking/labor petitioners' attempt to relitigate in this Court the need for "protection" of the motor carrier industry from railroad "invasion" (*see* Pet. at 17-18) is unavailing and inappropriate. To accomplish their impermissible objective, they rely on extra-record materials that allegedly demonstrate that "[i]f the decision below is permitted to stand, the way for rail domination of land transportation will have been cleared." *See* Trucking/labor Pet. at 17-18; *see also* Table I at 28a, Table II at 29a.

These gloomy predictions of economic harm have been considered and rejected by the ICC and two courts of appeals and do not warrant review by this Court. The decision below, which involved review of an individual licensing application, confers no power on the railroads in general or Rio Grande in particular to "dominate" the motor carrier industry. The Commission found, and the Eighth Circuit agreed, that a grant of unrestricted motor common carrier authority to Rio Grande, a relatively small railroad operating entirely within a four-

---

[5] The conclusion that the policy was not required by opinions of this Court or statute was buttressed by the fact that the old policy in favor of "auxiliary" to or "incidental" to rail restrictions on rail-affiliated trucking companies never had been "iron-clad" and the Commission had liberally granted exceptions therefrom in appropriate circumstances. *American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1250.

state area, would be in the public interest. Petitioners have never challenged the extensive evidence supporting Rio Grande's application, choosing instead to attack the policy change in *Ex Parte MC-156* which was prompted by changes in the statute and which was affirmed by the Fifth Circuit. Their attempts to transform this application proceeding into a matter of industry-wide significance should be denied.

CONCLUSION

The petition for a writ of certiorari in No. 84-1518 should be denied.

Respectfully submitted.

JOHN H. CALDWELL
DENISE M. O'BRIEN
(Counsel of Record)

HAMEL & PARK
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202/835-8095

Attorneys for
The Denver and Rio Grande Western Railroad Company

SAMUEL R. FREEMAN
Vice President and General Counsel
JOHN S. WALKER
General Solicitor

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY
P. O. Box 5482
Denver, Colorado 80217

April 24, 1985

Office - Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1518

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

7pp

TABLE OF AUTHORITIES

Page

American Trucking Ass'ns v. *ICC*, 722 F.2d 1243, cert. denied, No. 83-2117 (Oct. 29, 1984) 1, 2, 3, 5

American Trucking Ass'ns v. *United States*, 364 U.S. 1 2

Motor Carrier Operating Authority-Railroads, 132 M.C.C. 978 ..... 2, 3, 5

Western Coal Traffic League v. *ICC*, 735 F.2d 1408 5

Statutes and regulations:

Hobbs Act, 28 U.S.C. 2341 *et seq.* 3, 4

28 U.S.C. 2344 1

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* 2

Staggers Rail Act of 1980, Pub. L. No. 94-448, 94 Stat. 1895 *et seq.* 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1518

TRI-STATE MOTOR TRANSIT CO., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners challenge the validity of the Interstate Commerce Commission's revised policy for licensing rail-affiliated motor carriers, which, in light of recent statutory amendments and changed conditions in the industry, no longer requires a showing of "special circumstances" in order for the carrier to obtain unrestricted motor carrier operating authority. The petition has no merit. The court of appeals lacked jurisdiction over this challenge to the validity of an agency rule because the petition for review was filed outside the 60-day period prescribed in the Hobbs Act, 28 U.S.C. 2344. Moreover, the policy at issue here was previously upheld by the Fifth Circuit, *American Trucking Ass'ns* v. *ICC*, 722 F.2d 1243 (1984), and this Court denied a virtually identical petition for a writ of certiorari, No. 83-2117 (Oct. 29, 1984). The present duplicative effort to obtain review should similarly be denied.

1. In January 1983, the ICC issued a final policy statement in Ex parte No. MC-156, *Motor Carrier Operating Authority-Railroads,* 132 M.C.C. 978 (served Jan. 6, 1983), abolishing the so-called "special circumstances" doctrine in the licensing of rail-affiliated motor carriers.[1] The American Trucking Associations, Inc. (ATA) (and several of its affiliated conferences and associations), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) sought review of the ICC's decision in the United States Court of Appeals for the Fifth Circuit. On January 20, 1984, the court of appeals affirmed the ICC's decision in all respects. *American Trucking Ass'ns* v. *ICC,* 722 F.2d 1243 (5th Cir.). The ATA and the Teamsters filed a petition for a writ of certiorari that was denied by this Court. No. 83-2117 (Oct. 29, 1984).

While the Fifth Circuit was considering the challenge to the agency's policy statement, the Denver & Rio Grande Western Railroad Company (D&RGW), a rail carrier, filed

---

[1]The "special circumstances" doctrine was a longstanding exception to the national policy to protect motor carriers from encroachment by railroads. Under that exception, the ICC could grant to a railroad unrestricted motor carrier operating authority if it was shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service which existing carriers had not offered except where it suited their convenience. See *American Trucking Ass'ns* v. *United States,* 364 U.S. 1 (1960).

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.,* and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.,* which loosened regulatory strictures on the trucking and rail industries, the ICC opened a rulemaking proceeding to reevaluate its policies governing rail-motor operating rights. After rulemaking procedures allowing full public participation (in which the American Trucking Associations, Inc. (ATA) and Teamsters fully participated) the Commission announced that it would no longer require a showing of "special circumstances" for a rail-affiliated motor carrier, or a railroad, to obtain unrestricted motor carrier operating authority in a motor carrier licensing proceeding. Ex parte No. MC-156.

an application for a motor carrier license pursuant to the Ex parte No. MC-156 policy. Only one motor carrier, Tri-State Motor Transit Co. (Tri-State), opposed D&RGW's application. A Commission employee review board, relying upon the new Ex parte No. MC-156 policy, granted the application in a decision styled *The Denver & R. G. W.R.R.*, I.C.C. Docket No. MC-166474 (Sub-No. 1) (Aug. 26, 1983) (Pet. App. 9a-13a). The ATA and the Teamsters then sought to intervene in an appeal to the full Commission to assert that D&RGW's application should have been denied because the ICC's new policy was invalid. The Commission affirmed the review board (Pet. App. 14a-18a) and refused to entertain the ATA's and the Teamsters' arguments, noting that those parties merely sought to relitigate the validity of Ex parte No. MC-156, which was then under consideration by the Fifth Circuit (Pet. App. 15a). The ATA, the Teamsters, and Tri-State then petitioned for review under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, in the Eighth Circuit, some 11 months after the Ex parte No. MC-156 rule had been issued. The only substantive issue raised was the validity of ICC's abolition of the special circumstances doctrine — the same question then pending before the Fifth Circuit.[2]

Prior to the filing of briefs in the Eighth Circuit, the Fifth Circuit affirmed Ex parte No. MC-156. *American Trucking Ass'ns* v. *ICC, supra.* The Commission and the United States then argued in the Eighth Circuit that the court lacked jurisdiction to review the substantive validity of the Ex parte No. MC-156 policy because the Hobbs Act limits a court's jurisdiction to petitions filed within 60 days of the issuance of an ICC order, and because the Fifth Circuit had

---

[2]The ATA and the Teamsters also challenged the ICC's denial of their petition to intervene in the D&RGW administrative proceedings.

exclusive jurisdiction to review the validity of the ICC policy.[3]

The court of appeals rejected (Pet. App. 6a) petitioners' arguments that the Commission had acted improperly in abolishing the special circumstances doctrine, noting (Pet. App. 7a):[4]

> We therefore agree with the ICC and the Fifth Circuit *ATA* decision * * * that the showing required under the special circumstances doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the pro-competitive licensing regulations of the revised Interstate Commerce Act.

The court of appeals proceeded to affirm the issuance of D&RGW's operating license.

2. For the reasons stated in the government's petition for a writ of certiorari in this case, No. 84-1515 (filed Mar. 25, 1985), the lower court lacked jurisdiction to consider petitioners' attempt to relitigate the validity of the special circumstances doctrine. If we are correct, it follows that this Court, too, lacks jurisdiction to consider petitioners' challenge to the lower court's decision, which entertained an attack on an ICC decision more than 60 days after the issuance of that decision, contrary to the Hobbs Act, 28 U.S.C. 2341 *et seq.*

---

[3]The government also argued that petitioners were collaterally estopped from challenging the merits of the Commission's new policy in the guise of a challenge to the D&RGW licensing proceeding because the very same petitioners had previously, and unsuccessfully, challenged the policy in another court.

[4]The court of appeals reached the merits after rejecting the government's jurisdictional arguments. Those jurisdictional rulings are the subject of the government's petition for a writ of certiorari in No. 84-1515 (filed Mar. 25, 1985).

3. In any event, the instant petition by the ATA, the Teamsters, and Tri-State need not detain this Court for long, as it merely repeats, largely verbatim, the same parties[5] earlier petition for a writ of certiorari to the Fifth Circuit in *American Trucking*. *Compare* the petition in this case, No. 84-1518, *with* the petition and reply brief in No. 83-2117. Petitioners' contentions are no more deserving of review by this Court now — after they have been rejected by two courts of appeals — than they were last October.

Indeed, rather than demonstrating any basis for review on the merits, the instant petition instead illustrates the error of the lower court's jurisdictional ruling that we challenge in No. 84-1515. Here, petitioners are for a second time bringing before this Court the validity of the ICC's abolition of the special circumstances doctrine (see Pet. 3 ("The correctness of that holding [in Ex parte No. MC-156] is the issue presented by this case.")) — a matter that this Court has already declined to consider.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 84-1518 should be denied.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel
Interstate Commerce Commission

APRIL 1985

---

[5]While Tri-State was not a petitioner in the Fifth Circuit and previous certiorari litigation, as a member of the ATA, Tri-State should also be barred from relitigation of the issue. See Pet. App. 2a n.1, citing *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

DOJ-1985-04

Office - Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY MEMORANDUM

WILLIAM S. BUSKER
KENNETH E. SIEGEL
2200 Mill Road—Room 823
Alexandria, VA 22314
(703) 838-1857
Attorneys for Tri-State Motor Transit Co., and American Trucking Associations, Inc.

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOSEPH E. KOLICK, JR.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for International Brotherhood of Teamsters, Etc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Cases:

American Trucking Assns. v. U.S., 364 U.S. 1 (1960) 4
B-H Transfer Co. v. United States, 420 U.S. 968 (1975) 4
United States v. Rock Island Co., 340 U.S. 419 (1951) 4

United States Constitution:

Article III 2

Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2341 *et seq.* 2, 3
49 U.S.C. § 11344(c) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1518

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY MEMORANDUM

ARGUMENT

1. In its petition for certiorari in No. 84-1515, *in which it seeks review of the same judgment,* the government [1] asserts:

---

[1] By "government" we refer jointly to the Interstate Commerce Commission ("ICC") and the United States.

> * * * if the ruling of the court below stands, there is the real prospect that other courts of appeals will feel free to entertain challenges to the substantive validity of this same ICC rule. And, for the indefinite future—until every court of appeals has sustained the rule—uncertainty will prevail and litigation will abound. The resulting burdens, for the government and for the courts, warrant this Court's intervention without further delay. [Pet. No. 84-1515, pp. 13-14, footnote omitted]

The "same ICC rule" is of course the ICC's repudiation of the longstanding "special circumstances" doctrine as applied to the granting of motor carrier operating authority to railroads and their affiliates. And if, as the government asserts (and we agree) the removal of the existing uncertainty and avoidance of future litigation concerning the validity of that rule warrants this Court's "intervention without further delay" the present petition should be granted because that is far more likely to accomplish that result.

The "uncertainty" can be removed in either of two ways. The first is, of course, review on the merits of the Interstate Commerce Act issue, which is raised only in the Tri-State petition. The second is by accepting the government's interpretation of the Administrative Orders Review Act (Hobbs Act), in which event any future attempt by a litigant who is adversely affected by the operation of the new rule will be barred from challenging its validity. That issue, too, can be resolved if the Tri-State petition is granted, and must indeed be addressed at the outset because it affects the jurisdiction of the Court of Appeals. See p. 9 of our Brief in Opposition in No. 84-1515. Moreover, there is a greater likelihood that the Hobbs Act issue will actually be resolved if the Court grants the Tri-State petition because there is, at the very least, a very substantial doubt whether the Court has jurisdiction under 28 U.S.C. § 1254(1) and Article III of the Constitution to entertain the government's petition.

See *id.*, pp. 3-9. It may be pertinent in this connection that if the Court were to take the unprecedented step of granting a petition at the behest of a party which fully prevailed in the Court of Appeals (see *id.*, p. 5), it would open the door to the filing of future petitions for certiorari by such parties who seek a definitive resolution of a question in which they have a continuing interest. Finally, if the Court were to decide, in accord with the court below and the three other Circuits which have passed on the issue (*id.* pp. 10-11), that the Hobbs Act does not bar affected parties from challenging the legality of the ICC's new rule, the future litigation which the government fears will occur absent a decision on the merits on Tri-State's petition.

In sum, the "uncertainty" which concerns the government is far more likely to be removed if this Court grants the petition of Tri-State, *et al.*, in No. 84-1518, and this petition should be granted.

2. In its Brief in Opposition respondent Denver & Rio Grande Western Railroad Company attributes to us the "inexplicable concession to this Court that the 'special circumstances' doctrine is 'statutorily required' only with respect to licensing proceedings, the only matter resolved in *Ex Parte MC 156* * * * "(DRGW Br. p. 6, n. 4). In thus attributing a "consession" to us, respondent Railroad has misread the passage in question, the object of which was to describe as precisely as possible the interrelationship between Congressional and agency action with regard to acquisitions and licensing respectively. While we believe that our original statement was as clear as language permits, the importance of the point merits reiteration. The Interstate Commerce Act by its express terms (presently 49 U.S.C. § 11344(c)) restricts only rail *acquisitions* of motor carriers. However, the ICC in 1938 applied the same restriction to railroad applications for motor carrier operating *licenses*. To that extent, the licensing restrictions originated with the Com-

mission. But those restrictions were ratified by Congress in 1940 with respect to *both acquisitions and licensing*. By that 1940 ratification the licensing restrictions also became "statutorily-required" (DRGW Br. p. 6, n.4.) The ICC itself so recognized in the *Rock Island* case quoted at p. 5 of our petition, and this Court so held in *United States v. Rock Island Co.*, 340 U.S. 419, 432 (1951), reaffirmed in *American Trucking Assns. v. U.S.*, 364 U.S. 1, 6-7 (1960) (*ATA II*). The latter case made entirely clear that the "special circumstances" doctrine with respect to both acquisitions and licensing is "Congressional" policy. See pp. 11-15 of our petition. We note that neither of the briefs in opposition discuss those decisions, and that the government is conspicuously silent concerning the inconsistency between its discussion thereof in its brief to this Court in the *B-H Transfer Co.* case, quoted at pp. 14-15 of our brief, and its present position.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari in No. 84-1518 should be granted.

Respectfully submitted,

WILLIAM S. BUSKER
KENNETH E. SIEGEL
2200 Mill Road—Room 823
Alexandria, VA 22314
(703) 838-1857
Attorneys for Tri-State Motor Transit Co., and American Trucking Associations, Inc.

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOSEPH E. KOLICK, JR.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for International Brotherhood of Teamsters, Etc.